IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 24303-6-III**
	)	
	)	
Respondent,	)	**Division Three**
	)	
vs.	)	
	)	
	)	
MAC TEEJAY ALBRECHT,	)	**UNPUBLISHED OPINION**
	)	
	)	
Appellant.	)	

BROWN, J.—Mac Teejay Albrecht appeals his 2005 Benton County conviction in a bench trial of the offense of possession of a controlled substance, methamphetamine. He contends for the first time on appeal that (1) the superior court erred in considering his statements to a police officer without the benefit of *Miranda*[1] and (2) his lawyer provided ineffective assistance when he waived a CrR 3.5 hearing and did not object to the admission of those statements. Because the record on appeal is insufficient to support Mr. Albrecht's contentions, we affirm.

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Richland Police Officer David A. Clark testified at Mr. Albrecht's trial. He stated he responded to a call of "suspicious circumstance, possible bank robbery" at a Richland credit union. Report of Proceedings (RP) at 7. Following procedures, Officer Clark positioned himself to observe the building in question. He noticed Mr. Albrecht pacing back and forth in the parking lot of the credit union. Mr. Albrecht periodically stopped at a vehicle in the parking lot and reached inside it, as if taking something out of the vehicle or placing something in it. Officer Clark thought he might be acting as a look-out for an accomplice inside the building.

When Mr. Albrecht started walking toward the street, Officer Clark decided to take him into custody. He testified the robbery report had mentioned a weapon. Thus, he did not want Mr. Albrecht to move into a more populated area. Officer Clark then arrested Mr. Albrecht, had him take off his jacket and leave it on the hood of the police car, and handcuffed him. Officer Clark asked Mr. Albrecht if he was armed, and Mr. Albrecht said he was not.

Officer Clark then asked Mr. Albrecht for consent to search his car. Officer Clark testified he told Mr. Albrecht that he did not have to consent and that he could withdraw his consent at any time. Mr. Albrecht consented to the search.

Officer Clark testified he approached the vehicle and, looking through the open window, saw a glass pipe, which he identified through his experience and training to be a "meth pipe." RP at 9. He reached inside the vehicle and seized the pipe. Officer Clark showed the pipe to Mr. Albrecht and asked who owned it. Officer Clark testified

"after a few minutes of back and forth about he didn't know who it belonged to, he finally did say that it was his." RP at 9.

Officer Clark then asked Mr. Albrecht when he last used methamphetamine. He responded that it was the night before. Officer Clark asked him if he had smoked all the methamphetamine in his possession, and he said, "no." RP at 9. Further, it had made him sick, and so he was not sure it really was methamphetamine. Mr. Albrecht said he had a "meth" use problem and had recently been released from a treatment program.

Officer Clark asked Mr. Albrecht where the rest of the methamphetamine was, and Mr. Albrecht initially told him it was at his residence. He then changed that response to admitting the methamphetamine was in his coat pocket. Officer Clark searched the jacket and removed a Tupperware container. Its contents field tested positive for methamphetamine. Mr. Albrecht was charged with unlawfully possessing methamphetamine.

The defense specifically waived a CrR 3.5 hearing to contest Mr. Albrecht's statements. The defense did not object to statement admission at trial. While admitting possessing the methamphetamine, Mr. Albrecht denied unlawful possession because he insisted he had been holding it while attempting to turn it over to proper authorities. After a bench trial, the court found Mr. Albrecht's explanation incredible and convicted him as charged. Mr. Albrecht appealed.

ANALYSIS

A. Statements

On appeal, Mr. Albrecht concedes Officer Clark properly executed an investigatory stop as part of the bank robbery investigation. *See Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). But, he contends for the first time his statements to Officer Clark were inadmissible, arguing the officer's questions were custodial and asked for the purpose of eliciting an incriminating response. The appeal record does not show whether Officer Clark had first advised Mr. Albrecht of his constitutional rights.

We do not consider an error that is raised for the first time on appeal unless it is manifest constitutional error. RAP 2.5(a); *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). Mr. Albrecht has that burden. *State v. Williams*, 137 Wn.2d 746, 749, 975 P.2d 963 (1999). Here, the error is not manifest because the record is silent as to whether Officer Clark gave Mr. Albrecht the *Miranda* warnings before questioning him. That type of fact is usually developed in a pretrial hearing held pursuant to CrR 3.5(a). But, Mr. Albrecht waived a CrR 3.5 hearing. "[Although the provisions of CrR 3.5 are] mandatory, . . . under proper circumstances the right to a voluntariness hearing and the other requirements of the rule, such as the formal entry of written findings, can be waived." *State v. Myers*, 86 Wn.2d 419, 425, 545 P.2d 538 (1976).

B. Assistance of Counsel

Mr. Albrecht next contends his trial lawyer's failure to raise the issue of the voluntariness of his statements constituted ineffective assistance of counsel. Again, the record on appeal is insufficient to support this assertion.[2] Mr. Albrecht's remedy, if any, is to timely file a personal restraint petition and an affidavit that he gave the statements, absent advice of his constitutional rights, and that he did not knowingly waive the right to object to admission of those statements at trial. *See* RAP 16.4; RAP 16.7; and RCW 10.73.090. Accordingly, we do not analyze whether any error was harmless.

Affirmed.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

Brown, J.

WE CONCUR:

[2] Contrast *State v. Meckelson*, 133 Wn. App. 431, 433, 135 P.3d 991 (2006), in which this court found ineffective assistance of counsel, reversed a conviction, and remanded for a suppression hearing because the defense attorney "[f]ail[ed] to bring a plausible motion to suppress potentially unlawfully obtained evidence." The facts in the record in *Meckelson* included facts from which the defense could have argued that the initial stop of the vehicle in which defendant was driving was pretextual. Here, the record is silent on whether Officer Clark gave Mr. Albrecht the *Miranda* warnings.

Sweeney, C.J.

Kato, J.